ROXY ELECTRIC INDUSTRIES (M) BHD.

v.

SYKT. NOMINEE BUMIPUTRA SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. D4-22-926-89]
9 JUNE 1989

COMPANY LAW: *Section 144 of the Companies Act 1965 - Whether requisition and special notice bad in law - Whether it had complied with the requirements in s. 144(2) - Members entitled to issue requisition and special notice for an EGM - Take over - Acquisition of shares by acquirer - Whether defendants acting in concert - Circumstantial evidence.*

CIVIL PROCEDURE: *Injunction - Test to be applied - Grant or refusal of injunction would put an end to the matter without the trial of the matter - Balance of risk of doing an injustice.*

This is an application by the plaintiff company for an injunction to restrain the 1st and 2nd defendants or their agents from convening an EGM and from passing a resolution to remove the existing board of directors in the plaintiff company.

The plaintiff is a public company limited by shares. Both 1st and 2nd defendants are registered holders of 10,975,680 and 21,739,732 shares respectively in the plaintiff company. The 3rd defendant to the 6th defendants are parties having direct or indirect interests in the plaintiff company.

On 4 April 1989, a requisition and a special notice for an EGM of the plaintiff company under s. 144 of the Companies Act 1965 were served on the plaintiff company by the 4th defendant. The said documents were signed by both 1st and 2nd defendants. The EGM was for the purpose of removing the existing directors and to appoint in their stead the 7th to 12th defendants.

On 25 April 1989 plaintiff company informed the defendants that the board of directors would not convene the EGM on the ground that the requisition lacked formal particulars and that the notice was bad in law. 2 days later, plaintiff company filed a writ against all the defendants and on 28 April 1989, the present application was filed.

The grounds relied upon by the plaintiff company were that:

(i) the requisition and the special notice were bad in law and therefore had no effect.

(ii) the 1st and 2nd defendants were not entitled to issue the requisition and special notice under s. 144 of the Companies Act.

(iii) calling for an EGM by the defendants were in contravention of s. 179 of the Companies Act i.e., defendant were acting in concert to effect a take over of the plaintiff company. Further the plaintiff company enumerated certain facts and asked the Court to draw an inference that the defendants had a common purpose to take over the affairs of the company.

Held:

[1] Section 144(2) of the Companies Act 1965 states that (i) the requisition shall state the objects of the meeting (ii) it shall be signed by the requisitionists; and (iii) it shall be deposited at the registered office of the company.

In this case, the requisition expressly stated that the meeting was for the purpose of considering and passing the resolution stated. There is no ambiguity in the objects of the meeting and the directors clearly understand what the objects of the meeting were. As to the second requirement, there is evidence that the requisition and special notice were signed by the authorised officers. Thirdly, the requisition was not required to bear the common seals of the requisitionists.

[2] Under s. 144(1) of the Companies Act 1965, members may requisition for an EGM if they are holding at the date of the deposit of the requisition not less than one tenth of the paid up capital as at the date of the deposit. A member of a company is a person whose name is on the register of shareholders. Here, both 1st and 2nd defendants were shown to be the registered owners of the number of shares as at 4 April 1989. The shareholding of 1st and 2nd defendants taken together constituted about 24.9% of plaintiff company total issued and paid up share capital.

[3] It is from s. 179 of the Companies Act 1965, that there must be an acquisition of shares by the acquirer. There is no evidence of acquisition of shares by the defendants in the present case. The burden is on the plaintiff company to prove that the defendants had acquired shares in addition to what they already had. This the plaintiff company had failed to do so. In fact on the figures submitted by the plaintiff, it was admitted the defendants had a total of 49,481,733 shares which constituted 36.46% of plaintiff company paid up capital. Since there was already 36.46% of the paid up capital of plaintiff company, owned by the defendants, the question of acquiring more shares for the purpose of taking over under s. 179 of the Companies Act 1965 did not arise at all. Persons may only act in concert to effect to take over if the total percentage of their voting right in a company is less than 33%.

[4] The Court drew an inference from the circumstances as stated by plaintiff so that the defendants had a common purpose to take over the plaintiff company. Distinguishing the Associated Northern Collieries case and the 2 criminal cases on the ground that they were decided after trials where the facts in those cases were proved. The Court should be cautious in applying the principle of circumstantial evidence in those cases to the present case. The present case is only at an interlocutory stage where the Court is relying on affidavit evidence.

[5] The test in *Cayne's* case should be applied in considering whether to grant or refuse an injunction in the present case. In *Cayne's* case the test to be applied are (1) the grant or refusal of an injunction would put an end to the matter without the trial of the action; and (2) the Court has to consider the balance of the risk of doing an injustice. The Court decided that if an injunction is granted in favour of plaintiff company that would mean giving the plaintiff company judgment in the case against the defendants. The defendants would have no opportunity to bring the case to trial. Further it is found that the risk of doing an injustice is greater if the injunction is granted. On the other hand it would be doing substantial justice to the shareholders if they be given the opportunity to elect their new directors. Finally, it has always been the policy of the Court not to interfere with the meeting of shareholders if it was properly constituted and if the meeting was convened in good faith.

[Application dismissed with costs.]

Cases referred to:
Pender v. Lushington [1877] Ch D 70
Siemens Brothers & Co. Ltd. v. Burns [1918] 2 Ch 324
Dominion Mining NL v. Hill & Anor. [1971 - 1976] 27 ACLC 27
Chan Chwen Kong v. Public Prosecutor [1962] 28 MLJ 67
Jayaram v. Public Prosecutor [1982] 2 MLJ 306

The King and the Attorney-General of the Commonwealth v. The Associated Northern Collieries & Ors. [1911] 14 CLR 387
Mohamed Zainuddin bin Puteh v. Yap Chee Seng [1978] 1 MLJ 40
American Cynamid Co. v. Ehticon [1975] 2 WLR 316
Cayne & Anor. v. Global Natural Resources [1984] 1 All ER 225
Matang Holdings Bhd. & Ors. v. Dato Lee San Choon & Ors. [1985] 2 MLJ 406
Last & Anor. v. Buller & Co. 36 TLR 35
Burland & Ors. v. Earle & Ors. [1902] AC 83
Theseus Exploration NL v. Mining and Associated Industries Ltd. [1973] Qd R81
Humes Ltd. v. Unity APA Ltd. & Anor. [1987] 5 ACLC 15
Punt v. Symons & Co. Ltd. [1983] 2 Ch 506

Legislation referred to:
Companies Act 1965, ss. 2, 16(6), 144, (1), 179, 179(1)

For the plaintiff - K.K. Chan, A. Leong with him; M/s. Riza Leong & Partners
For the first defendant - D.P. Naban; M/s. Skrine & Co.
For the second defendant - Sofia Chew; M/s. K.C. Yap & Kamaluddin
For the third and sixth defendants - C. Abraham; M/s. Shearn Delamore, Andrew & Napier
For the seventh defendant - S. P. Lim; M/s. S.P. Lim & Co.

JUDGMENT

Zakaria Yatim J:

This is an application by the plaintiff, Roxy Electric Industries (Malaysia) Berhad (hereinafter referred to as "Roxy") for an injunction to restrain the first defendant, Syarikat Nominee Bumiputra Sdn. Bhd. (hereinafter referred to as "Nominee Bumiputra") and the second defendant, Visia Nominees Sdn. Bhd. (hereinafter referred to as "Visia Nominees") whether by themselves or by their servants or agents or nominees, (a) from convening, calling, holding or conducting an extraordinary general meeting (EGM) of Roxy for any or all the purposes and objects set out in the notice of requisition dated 4 April 1989 issued by Nominee Bumiputra and Visia Nominees; and (b) from removing or attempting to remove or taking any step to alter the composition of Roxy's board of directors. The application was heard *inter partes*.

Roxy is a public company limited by shares. Its shares are listed on the Kuala Lumpur Stock Exchange and the Stock Exchange of Singapore. Nominee Bumiputra is a wholly owned subsidiary of Bank Bumiputra Malaysia Berhad (Bank Bumiputra). Nominee Bumiputra is a registered holder of 10,975,680 shares in Roxy. Visia Nominees is a subsidiary wholly owned by Visia Finance Berhad. Visia Nominees is a registered holder of 21,739,732 shares in Roxy. The third defendant, Dato' Alexander Yu Lung Lee (Dato' Alex Lee) was a former managing director of Roxy. He is the beneficial owner of 5,612,697 shares registered in the names of various nominees. The fourth defendant, Mr. Christopher Fook Hong Lee (Mr. Christopher Lee) is the son of Dato' Alex Lee and a former director of Roxy. The fifth defendant, Irex Sdn. Bhd. is a company owned directly or indirectly by Dato' Alex Lee and his children. The sixth defendant, Tun Sir Henry H.S. Lee and Sons Sdn. Bhd. (Tun H.S. Lee Bhd.) is a company controlled directly or indirectly by members of the family of the late Tun Sir Henry H.S. Lee, the father of Dato Alex Lee.

On 4 April 1989 a requisition for an EGM of Roxy under s. 144 of the Companies Act 1965 accompanied by a special notice of several resolutions intended to be tabled at the EGM were served on Roxy by Mr. Christopher Lee. The requisition and the special notice were signed by Nominee Bumiputra and Visia Nominee and dated 4 April 1989. In the requisition

they stated that they were the registered holders of ordinary shares in Roxy representing more than 10% of the total rights for all members having a right to vote at general meetings of Roxy. The resolutions to be considered at the EGM were for the purpose of removing the five existing directors of Roxy and to appoint in their stead Mr. James Puthucheary, the seventh defendant; Mr. Lim Keng Guan, the eighth defendant; Mr. Yeo Eng Seng, the ninth defendant: Encik Zaki Tun Azmi, the tenth defendant; Dato' Wong Soon Foh, the eleventh defendant and Mr. Goh Joon Hai, the twelfth defendant.

On 25 April 1989 Roxy wrote to the requisitionists informing each of them that the board of directors would not convene the EGM. In the letter it was stated that the requisition lacked formal particulars. It also stated that the notice was illegal, null and void and of no effect and not binding upon the board of directors. The letter further stated that the EGM of Roxy could not be convened. On 27 April 1989, Roxy filed a writ against all the defendants and on 28 April 1989 the present application was filed.

Roxy's first contention was that the requisition and the special notice were bad in law and therefore had no effect. In his affidavit affirmed on 28 April 1989. Encik Hamdan bin Mohamad, a director of Roxy, (Hamdan's first affidavit) averred in para. 12(b) that the requisition and special notice did not bear the common seals of Nominee Bumiputra and Visia Nominees and the documents were not duly executed by authorised representatives of Nominee Bumiputra and Visia Nominees and registered with Roxy.

The question for the Court to consider is whether the requisition and special notice were bad in law as alleged by Roxy. Sub-section 2 of s. 144 states that (1) the requisition shall state the objects of the meeting; (2) it shall be signed by the requisitionists; and (3) it shall be deposited at the registered office of the company.

With regard to the objects of the EGM, the requisition expressly stated that the meeting was for the purpose of considering and, if thought fit passing the resolutions stated therein with or without modification. In my view there is no ambiguity in the objects of the meeting. The directors of Roxy understood clearly what the objects of the meeting were. In para. 10 of the same affidavit, Encik Hamdan said that the cumulative effect at Exhibits P6 and P7 (namely the requisition of the special notice) if carried at the EGM would be the removal of the board of directors of Roxy as presently constituted and the replacement of the board by the seventh, eighth, ninth, tenth, eleventh and twelfth defendants.

As to the second requirement, there is evidence that the requisition and the special notice were signed by the authorised officers. In her affidavit affirmed on 12 May 1989, Zauyah Wan Chik, an officer of Bank Bumiputra and a director of Nominee Bumiputra (Zauyah's first affidavit) averred in para. 3, that the requisition was executed and/or signed on behalf of Nominee Bumiputra by herself and she was duly authorised to execute the document on behalf of Nominee Bumiputra.

Mr. Lim Seng You, a company secretary of Visia Nominee, in his affidavit affirmed on 12 May 1989, stated that the requisition was executed by Mr. Ooi Sang Kuang, the chief executive officer for and on behalf of Visia Nominees, He said that Mr. Ooi Seng Kuang was duly authorised to execute the said requisition on behalf of Visia Nominees.

As to the third requirement it is not in dispute that Mr Christopher Lee served the requisition and the special notice on Roxy. Subsection (2) does not require the documents to bear the common seals of the requisitionists. The articles of association of Roxy also do not contain such requirement.

In my view the requisition and the special notice complied with the requirement of, subsection (2) of s. 144, and the articles of association of Roxy.

The next question to consider is whether the requisitionists were entitled to issue the requisition and the special notice under s. 144. Under Subsection (1) members may requisition for an EGM if they are holding, at the date of the deposit of the requisition not less than one-tenth of the paid-up capital as at the date of the deposit. The word "members" in subsection (1) has been defined in s. 16(6) of the Companies Act, which states:

> The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, **and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company**. (Emphasis added)

Under Art. 12 of the articles at association of Roxy, every person whose name is entered as a member in the register of members is entitled to receive a share certificate. Therefore, a member of a company is a person whose name is on the register of shareholders. The register is the only evidence by which the rights of members to vote at a general meeting can be ascertained. *Pender v. Lushington* [1877] Ch D 70.

It is admitted by Roxy in para. 6 of Hamdan's first affidavit that based on information in Roxy's register of members and other statutory registers required to be maintained by Roxy, Nominee Bumiputra and Visia Nominees were shown to be the registered owners of the number of shares as at 4 April 1989 appearing against their names as follows:

Nominee Bumiputra - 12,082,680 shares

Visia Nominees - 21,739,732 shares

The shareholding of Nominee Bumiputra and Visia Nominees, taken together constituted about 24.9% of Roxy's total issued and paid-up share capital.

It is not in dispute that Bank Bumiputra and Visia Finance received Roxy shares from various persons as security for money lent to them. These shares were registered in their nominees namely Nominee Bumiputra and Visia Nominees respectively. This is the modern practice of banks and financial institutions and this practice is recognized by Roxy, Nominee Bumiputra and Visia Nominees in their respective affidavits. See J.M. Holden, *The Law and Practice of Banking*, 7 Edn., Vol. 2, p. 269. Once the shares were registered in their names, they became members of Roxy and were entitled to exercise voting rights at Roxy's meetings. See *Siemens Brothers & Co. Ltd. v. Burns* [1918] 2 Ch 324.

In my opinion, Nominee Bumiputra and Visia Nominees were registered members holding more than one tenth of Roxy's paid-up capital and accordingly they were entitled to issue the requisition and the special notice under s. 144(1) at the Companies Act.

Mr. Naban rightly submitted that the issuance of requisition by members of a company is an important right given by statute to members so that they might be able to attend a general meeting and exercise their right to vote. In my view the directors of Roxy were wrong when they informed the requisitionists by a letter dated 25 April 1989, that they would not convene the EGM on the ground that the requisition was "lacking in formal particulars". Encik Hamdan was also wrong when he said in his first affidavit that the requisition and special notice did not bear the common seal of Nominee Bumiputra and Visia Nominees. In *Dominion Mining NL v. Hill & Anor.* [1971-1976] 27 ACLC 27, Street J, said:

> I am strongly deposed towards upholding the validity in a technical sense of the convening of this meeting if that course is properly open under the documents and within the evidence. The Courts should not be astute to frustrate attempts by a large number of members, holding a large proportion of shares in a company, to give voice to their wishes through the machinery of a meeting. I have little sympathy with directors who, having chosen to disregard the spirit of s. 137, attempts to take technical points to prevent shareholders validly assuming the initiative in summoning a meeting.

Mr. Sri Ram submitted that the deposit of the requisition and special notice was not a *bona fide* move to hold a meeting of Roxy's shareholders but it was an attempt on the part of the defendants to take over Roxy. He referred to Hamdan's first affidavit where in para. 17 it was alleged that the "1st, 2nd, 3rd and 4th defendants are and were at all material times acting jointly or in concert in the preparation, issuance and service" of the requisition and the special notice. The deponent of the affidavit alleged that the preparation and or issuance of and/or the service of the requisition and the special notice and the proposal to hold and convene and conduct the EGM and the business to be transacted at the meeting as envisaged in the requisition and the special notice were in contravention of s. 179 of the Companies Act. In support of the allegation, Hamdan, in the same affidavit averred that on the afternoon of 20 April 1989, a meeting was held at the offices of the Nominee Bumiputra where several representatives of banks and financial institutions, who were registered members were present. He added that Dato Alex Lee and Mr. Christopher Lee were present at the meeting. According to him those who were present at the meeting were briefed by a solicitor whose identity he was not aware of. Mr. Sri Ram also referred to the extraordinary general meeting of Roxy held on 3 May 1989. According to Hamdan's affidavit affirmed on 13 May 1989 (Hamdan's second affidavit), at that extraordinary general meeting Nominee Bumiputra was represented by a proxy holder, who was also proxy for certain other registered shareholders of the plaintiff. He alleged that most of the other registered shareholders were also nominees of financial institutions with whom Dato' Alex Lee, Mr. Christopher Lee, Irex Sdn. Bhd. and Tun H.S. Lee Bhd. or a combination of two or more of them had pledged Roxy shares as security for loans borrowed by one or more of them. He added that at that meeting a resolution prepared by the directors of Roxy was amended. According to Hamdan the "instructions given by 'Nominee Bumiputra and Visia Nominees' to the respective proxy holders is yet another circumstance confirmatory of the plaintiff's contention that the 1st, 2nd, 3rd, 4th, 5th and 6th defendants are and were at all material times acting in concert to effect a take-over of the plaintiff in breach of written law."

The question for the Court to consider now is whether the defendants were attempting to take-over Roxy. Section 179(1) defined the term "take-over" in the following words:

> 'take-over' means an acquisition of shares in a company which, when aggregated with shares already held by the acquirer, would give the acquirer the right to exercise or control the exercise of more than thirty-three per centum of the voting right of that company.

The word "acquirer" is defined in the same section to mean *inter alia*, two or more persons who, acting in concert with one another, effect or propose to effect a take-over of a company whether they effect the take-over themselves or by an agent.

It is clear from s. 179, that there must be an acquisition of shares by the acquirer. There is no evidence of acquisition of shares by the defendant in the present case. The burden is on the plaintiff to prove that the defendants had acquired shares in addition to what they already had. This the plaintiff had failed to do. In fact on the figures submitted by the plaintiff, it was admitted that the defendants had a total at 49,481,733 shares which constituted 36.46%

of Roxy's paid-up capital. These figures were prepared and presented to the Court (as encl. 19) by Mr. Sri Ram. Since there was already 36.46% of the paid-up capital of Roxy, owned by the defendants, the question of acquiring more shares for the purpose of taking over under s. 179 did not arise at all. The allegation that the defendants were acting in concert for the purpose of effecting a take-over has no foundation whatsoever. Persons may only act in concert to effect a take over if the total percentage at their voting right in a company is less than 33%. In my view there is no reason for the defendants to act in concert in view of the total number at shares registered in their names.

The allegation that the first to sixth defendants were acting in concert at a meeting held on 20 April 1989 is misconceived. If at all there was an attempt to take over Roxy, the acquisition of shares would have been completed before that date. Similarly the allegation that at the meeting held on 3 May 1989, the defendants were acting in concert for the purpose of effecting a take-over had no basis in the circumstances of this case.

The meeting held on 3 May 1989 was not a meeting of the defendants only. It was an extraordinary general meeting attended by the directors of Roxy as well. The defendants cannot be said to be acting in concert. Rule 2 of the Malaysian Code on Take-Overs and Mergers 1987 (PU(B)173) defines "acting in concert" as follows:

> 'Acting in concert.' Persons acting in concert comprise persons who, pursuant to an agreement or undertaking (whether formal or informal) actively cooperate, through the acquisition by any of them, of shares in a company, to obtain or consolidate control of that company ...

Mr. Sri Ram enumerated certain facts and asked the Court to draw an inference that the defendants had a common purpose to take-over the affairs of the company. The following are the circumstances mentioned by him:

(1) The meeting sought by the requisition and special notice jointly made by Nominee Bumiputra and Visia Nominees served on 4 April 1989 on Roxy by Mr. Christopher Lee who is the son of Dato' Alex Lee Mr. Christopher Lee was not an officer of Nominee Bumiputra or Visia Nominees.

(2) The requisition itself called for displacement of the Board of new directors proposed by Nominee Bumiputra and Visia Nominees. It was a fair inference that Nominee Bumiputra and Visia Nominees intended that the 7th to 12th defendants should do their bidding on the Board of Roxy. It showed intention to control the Board of Roxy.

(3) Both Nominee Bumiputra and Visia Nominees at all material times had a common interest and a common intention. This was to be deduced from them engaging the same solicitor on 4 April. Later they had separate solicitors Mr. Sri Ram submitted they came to be aware of the difficulty they might find themselves. Roxy gave notice that it would raise this point.

(4) Meeting of 20 April 1989. Here there was a telling evidence that it was convened at the invitation of Nominee Bumiputra however Nominee Bumiputra has said on oath that that meeting was held at the invitation of its solicitors.

(5) Dato' Alex Lee and Mr. Christopher Lee were present and participated at the meeting of 20 April. They said their presence there was merely formal. The Court might take into account the fact that Mr. Christopher Lee had said that Dato' Alex Lee had no interest in Irex Sdn. Bhd. because of the trust. If he was not having any interest why was he present?

(6) The proposed appointments of the seventh to twelfth defendants. Nominee Bumiputra and Visia Nominees proposed them. But they did not choose them. The Court can draw an inference that these people must have been approached by them. Dato' Alex Lee and Mr. Christopher Lee must have some knowledge. Why did they not tell the truth? What were they afraid of disclosing? Similarity in the language of the affidavits, the correspondence in the way in which points were taken. By itself it might mean nothing.

(7) Amendment to the resolution. Enclosure 11, pp. 52 and 53 which was proposed by directors of Roxy and passed at a meeting on 3 May 1989. This resolution was amended as shown at p. 63 of encl. 15. There was continuing intention to act in concert even after 20 April.

(8) The eleven letters enclosing draft amendments were sent to several shareholders, all of whom are financial institutions. One of them is Nominee Bumiputra's holding company - Bank Bumiputra. No evidence these letters were sent to Dato' Alex Lee and Mr. Christopher Lee. No reason for them to send to Bank Bumi because they were acting for Bank Bumi.

(9) At the meeting of 3 May 1989 amendments proposed by Nominee Bumiputra's proxy and supported or seconded by Visia Nominees' proxy? Mr. Sri Ram submitted this showed even at the 3 May meeting they were continuing to act in concert.

(10) Enclosure 15, p. 64 (Exhibit PL28) read with (P26) p. 60 - items 2 and 4.

(11) There was a history of the third, fourth, fifth and sixth defendants having acted in concert with the third party UIC.

(12) The fact that the affidavit filed by Mr. Christopher Lee for himself and for Dato' Alex Lee and Irex Sdn. Bhd. para. 4, encl. 17, Sir H.S. Lee Sdn. Bhd. also included. Therefore the third to sixth defendants had always common interest.

(13) There had been no full disclosure of relevant documents by Nominee Bumiputra or Visia Nominees relating to pledge. Either Nominee Bumiputra or Visia Nominees hold shares for themselves or they were acting on someone's instructions because they were nominee companies.

Mr. Sri Ram submitted that the Court can draw the inference from the circumstances as stated by him. In support of his submission he cited two criminal cases, namely *Chan Chwen Kong v. Public Prosecutor* [1962] 28 MLJ 67, and *Jayaram v. Public Prosecutor* [1982] 2 MLJ 306. In *Chan Chwen Kong* case, Thomson CJ (as he then was) in his judgment said:

> It must, however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

In *Jayaram's* case, the federal Court held that in a case depending on circumstantial evidence it was enough if the Court merely said that it was satisfied of the accused's guilt beyond reasonable doubt without further saying that the facts proved irresistibly pointed to one and only one conclusion, namely the accused's guilt.

Mr. Sri Ram submitted that in the present case there is sufficient evidence, not inherently incredible, and not inherently improbable to support a conclusion albeit *prima facie* conclusion that the first to sixth defendants were acting in concert within the meaning of s. 179(1)(6).

Mr. Sri Ram also cited an Australian case, *The King and the Attorney General of the Commonwealth v. The Associated Northern Collieries & Ors.* [1911] 14 CLR 387. In that case the High Court of Australia stated the common law principle as follows:

> Community of purpose may be proved by independent facts, but not necessarily so. If the other defendant is shown to be committing other acts tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that such separate acts were the outcome of pre-concert, or same mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.
>
> An unlawful conspiracy may be inferred from the conduct of the parties and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end which their conduct appears so obviously adapted to effectuate.
>
> Once the combination and its purposes are proved, the acts of any party to it in furtherance of those purposes are attributable to all, as being within the scope and in execution of their common agreement. No act which is not done in furtherance of the common purpose comes within that principle of admissibility.

In its judgment, the Court said:

> I quote as apposite to the present circumstances, and as expressing my opinion on arguments addressed to the Court, a passage from *Russel and Crimes*, 7th Edn., Vol. 1, p. 151.
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> 'The evidence in support of an indictment for a conspiracy is generally circumstantial; and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. Although the common design is the root of the charge it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, far in many cases of the most clearly established conspiracies there are no means of proving any such thing. If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of a common object they are pursuing, the jury are free to infer that they have been engaged in a conspiracy to effect that object. It is not necessary to prove the existence of a conspiracy before giving in evidence of the acts of the alleged conspirators, and isolated acts may be proved as steps by which the conspiracy itself may be established. In *R. v. Duffield* (3), Erle J directed the jury that it does not happen once in a thousand times when the offence of conspiracy is tried that anybody comes before the jury to say that he was present at the time when the parties did conspire together and when they agreed to carry out their unlawful purposes; that species at evidence is hardly ever to be adduced before a jury; but the unlawful conspiracy is to be inferred from the conduct of the parties; and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end, which their conduct appears so obviously adapted to effectuate.

It should be noted that the English rule on circumstantial evidence in criminal law was applied in that case.

I should point out here that *Associated Northern Collieries* case, and the two criminal cases referred to above were decided after trials. The facts in those cases were proved. The Court should be cautious in applying the principle of circumstantial evidence in those cases to the present case. The present case is only at an interlocutory stage where the Court is relying on affidavit evidence.

Even if the rule relating to circumstantial evidence applies in the present case, the question is whether, from all the circumstances enumerated by Mr. Sri Ram, this Court can come to the conclusion that the defendants were acting in concert for the purpose of effecting a take-over of Roxy? Mr. Cecil Abraham, Counsel for Dato' Alex and his son, submitted that the circumstances stated by Mr. Sri Ram occurred after 4 April 1989 that is the date of the requisition. I agree with Mr. Abraham's submission. If the circumstances occurred after 4 April 1989, the Court cannot draw an inference or reach a conclusion that the defendants were acting in concert to effect a take-over of Roxy.

The plaintiff alleged that Dato' Alex Lee's and Mr. Christopher Lee's presence at the meeting on 20 April 1989 showed that the defendants were acting in concert. Mr. Cecil Abraham replied that Dato' Alex Lee and Mr. Christopher Lee had a direct and indirect interest in Irex Sdn. Bhd. to justify their presence at the meeting. According to the documents exhibited to Hamdan's affidavit and according to the figures prepared by Roxy, Irex Sdn. Bhd. held 21,647,624 shares which were registered in the names of various nominees.

Finally, item 11 in the list of circumstances mentioned by Mr. Sri Ram alleged that the 3rd, 4th, 5th and 6th defendants had acted in concert with a third party. In Hamdan's second affidavit he averred as follows:

> ... in or about the month of August 1988, the plaintiff commenced a rights issue exercise to enable one United Industrial Corporation Limited ("UIC") to take over a controlling interest in the plaintiff. The rights issue exercise however was subsequently abandoned for reasons which are not relevant to the instant proceedings ... In the aforesaid rights issue exercise, the 3rd defendant and companies controlled by his family declared themselves as interested parties and assigned all their rights to UIC. Simultaneously, certain other beneficial owners of shares which were registered in the name of the 2nd defendant as nominee also declared themselves as interested parties in the rights issue exercise and also assigned all their rights to UIC. These assignments were made in order to assure that UIC would have a controlling interest of the plaintiff at the conclusion of the aforesaid exercise. In Exhibit "P24", the 3rd defendant together with members of his family and companies controlled by his family were declared as parties acting in concert with UIC. In this context, there is now produced and shown to me and marked as Exhibit "P25" a letter dated 31 October 1988 from the Panel On Take-Overs and Mergers addressed to solicitors for UIC. **The attempted takeover of the plaintiff by UIC acting in concert with the 3rd defendant, members of his family** (including the 4th defendant) **and his group of companies** (including the 5th and 6th defendants) **having failed**, the 3rd, 4th, and 5th defendants are now acting in concert with the 1st and 2nd defendants to now effect a takeover of the plaintiff by acting in breach of s. 179 of the Companies Act 1965 and other related legislation:"
>
> (Emphasis added)

From what I understand in the passage quoted above, the allegation that the three defendants were acting in concert to take over Roxy had failed. This means that there was no acquisition of shares and there was no take-over. In the circumstances the UIC issue has no relevance to the present case.

In my view even if circumstantial evidence is relevant at the present stage of the proceedings, all the circumstances must be considered as a whole. Each fact cannot be taken in isolation. Since most of the facts occurred after 4 April 1989, the rest of the facts cannot in law amount to acting in concert for the purpose of s. 179.

Furthermore at the material time the defendants already had 36.64% of the total paid-up capital in Roxy. This figure was in fact supplied by Roxy. In the circumstances, Mr. Sri Ram's contention that the defendants were acting in concert for the purpose of taking over Roxy must fail.

I now came to the final question, namely, what is the test to be applied in considering whether to grant or refuse an injunction in the present case.

Mr. Sri Ram referred to *Mohamed Zainuddin bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 40. That case was concerned with ordinary interlocutory injunction pending the trial of the action. The learned Judge in that case rightly applied the principles laid down in *American Cyanamid Co. v. Ethicon* [1975] 2 WLR 316. In the *American Cynamid* case the first question to be considered was whether there was a serious question to be tried. Secondly, whether a party could be adequately compensated and thirdly, the question of balance of convenience.

The next case relied upon by Mr. Sri Ram was *Cayne & Anor. v. Global Natural Resources* [1984] 1 All ER 225. This case was also relied upon Mr. Naban. In *Cayne* case it was decided by the Court of Appeal that where the grant or refusal of an interlocutory injunction would have the practical effect of putting an end to the action, the Court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice and to balance the risk of doing an injustice to either party. In such a case the Court should bear in mind that to grant an injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the right of trial. Accordingly the established guidelines requiring the Court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since whatever the strengths of either side, the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim at a trial.

Mr. Naban submitted that the right of the requisitionists to convene an EGM would expire soon. If the Court granted the injunction the requisition would have no effect. There would be no EGM and there would be no trial of the action. Mr. Naban further submitted that the *American Cynamid* case did not apply.

I agree with Mr. Naban's submission. The situation in the present case is that if an injunction is granted in favour of Roxy that would mean giving Roxy judgment in the case against the defendants. The defendants would have no opportunity to bring the case to trial. In view of the circumstances of this case, the Court cannot apply the tests laid down in the *American Cynamid* case. In other words the Court will not consider whether there is a serious question to be tried in the present case or look at the balance of convenience. In *Cayne* case May LJ, said:

> With those considerations in mind, I do not think that in cases such as the present, whatever the strengths on either side, where the decision on an interlocutory application for an injunction will effectively dispose of the claim, the Court can legitimately, nor is it bound, to apply the Cynamid guidelines, which, as I have already said, I think are based on the proposition that there will be a proper trial at a later stage when the rights of the parties will be determined.

In *Cayne* case the test to be applied are (1) the grant or refusal of an injunction would put an end to the matter without the trial of the action; and (2) the Court has to consider the balance of the risk of doing an injustice.

I have already dealt with the first test. With regard to the second test, I am of the view that the risk of doing an injustice is greater if the injunction is granted. On the other hand it would be doing substantial justice to the shareholders if given the opportunity to elect their new directors. See *Matang Holdings Bhd. & Ors. v. Dato Lee San Choon & Ors.* [1985] 2 MLJ 406. Whether they will succeed in passing the resolutions contained in the special notice is a matter for the shareholders to decide. The important thing is that the requisitionists had complied with the provisions of the law as contained in the Companies Act and the articles of association. They should be given the liberty to proceed with the EGM of the shareholders.

In considering the balance of the risk of doing injustice, I have to bear in mind that it has always been the policy of the Court not to interfere with the meeting of shareholders if it was properly constituted and if the meeting was convened in good faith. See *Last & Anor. v. Buller & Co.* 36 TLR 35; *Burland & Ors. v. Earle & Ors.* [1902] AC 83 Cl 93; *Theseus Exploration NL v. Mining and Associated Industries Ltd.* [1973] Qd R81; and *Humes Ltd. v. Unity APA Ltd. & Anor*. [1987] 5 ACLC 15. The Court however will grant an injunction to restrain a meeting and to prevent a clear abuse of powers on the part of the directors. See *Punt v Symons & Co. Ltd.* [1983] 2 Ch 506.

Finally I should add that in order for the plaintiff to succeed in obtaining the injunction to restrain a meeting of the shareholders, it must have a strong case. *Last v. Buller supra*. It must show that injustice would be done to it or to the shareholders if the injunction is not granted in its favour. In the present case the plaintiff does not have a strong case.

For the reasons stated above, I dismiss the plaintiff's application with costs.

Also found at [1989] 2 CLJ 657